DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)
c/o Attorney Scott Thompson
Kittelsen, Barry, Ross Et Al
P O Box 710
Monroe, WI 53566-0710

DECISION

MDV-23/53857

PRELIMINARY RECITALS

Pursuant to a petition filed June 20, 2002, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Green County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on August 27, 2002, at Monroe, Wisconsin. A hearing set for July 16, 2002, was rescheduled at the petitioner's request.

The issue for determination is whether the petitioner divested assets in order to gain MA eligibility.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

Glenn Kuhnke
c/o Attorney Scott Thompson
Kittelsen, Barry, Ross Et Al
P O Box 710
Monroe, WI 53566-0710

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Shelly Ray, ESS
Green County Dept Of Human Services
N3152 State Road 81
Monroe, WI 53566

William E Morgan
Green County Corporation Counsel

ADMINISTRATIVE LAW JUDGE:
Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Green County. Her date of birth is April 18, 1917. The petitioner is a resident of a skilled nursing facility. She had been certified for MA.

2. On June 19, 2002, the county agency sent a manual notice to the petitioner stating that effective July 1, 2002, her institutional MA would terminate due to the divestment of $39,400. The petitioner appealed prior to the effective date of the termination of the institutional MA and this Office ordered it to be continued.

3. xx and yy, served as joint powers of attorney (POA's) for the petitioner. The document establishing this principal-agent relationship is a durable power of attorney (DPOA). (See Exhibit #7.) There is no express authorization to the POA's to transfer property to themselves.

4. The petitioner owned a residence in Lafayette County. From August, 2001, through May, 2002, the POA's transferred either 9 or 10% of that property each month to themselves. After the May, 2002 transfer, the petitioner owned 6% of the property.

5. The POA's sold the property for $42,500 on June 5, 2002. (See Exhibit #1.) After expenses of the sale were deducted, the net amount was $39,490, which was kept by the POA's. The petitioner's 6% ($2,550) was totally spent on the expenses of the sale.

DISCUSSION

I APPLICABLE LAW CONCERNING DIVESTMENT

The issue in this case is whether the petitioner was ineligible for MA due to divestment. An institutionalized person, such as a nursing home resident, who transfers assets for less than fair market value after, or during the 36 months preceding a MA application, shall be ineligible for MA payment of nursing facility charges. A portion of the divestment statute, s 49.453, Wis. Stats, reads as follows:

> (1) DEFINITIONS. (A) In this section:
> (a) "Assets" has the meaning given in 42 USC 1396p(c)(5).
> (e) "Institutionalized individual" has the meaning given in 42 USC 1396p(c)(3).
> (f) "Look-back date" means for a covered individual, the date that is 36 months before.....:
> 1. For a covered individual who is an institutionalized individual, the first date on which the covered individual is both an institutionalized individual and applied for medical assistance.
>
> (2) INELIGIBILITY FOR MEDICAL ASSISTANCE FOR CERTAIN SERVICES.
> (a) Institutionalized individuals. Except as provided in sub. (8), if an institutionalized individual or his or her spouse, or another person acting on behalf of the institutionalized individual or his or her spouse, transfers assets for less than fair market value on or after the institutionalized individual's look-back date, the institutionalized individual is ineligible for medical assistance for the following services for the period specified under sub. (3):
> 1. For nursing facility services.

A disqualifying divestment occurs for MA purposes when an institutionalized individual, his/her spouse, or a person acting on his/her behalf disposes of nonexempt property for less than fair market value. Sec. 49.453(2), Wis. Stats., §HSS 103.065(4), Wis. Adm. Code, MA Handbook, Appendix 14.2.2. "Disposal" is defined in the Handbook as "the act of changing legal title or other right of ownership to another person or

persons." Id. If a divestment occurs, the individual is ineligible for MA for the number of months obtained by dividing the disposed amount by the statewide average monthly cost to a private pay patient in a nursing home. See §HSS 103.065(5)(b), Wis. Adm. Code.

As the transfer took place after August 9, 1989, the applicable state code language is in §HSS 103.065(4), Wis. Adm. Code, which states:

> 4. DIVESTMENT (a) Divestment resulting in ineligibility. An institutionalized individual or someone acting on behalf of that individual who disposes of a resource at less than fair market value within 30 months immediately before or at any time after the individual becomes institutionalized if the individual is receiving MA on the date he or she becomes institutionalized or, if the individual is not a recipient on that date, within 30 months immediately before or at any time after that date the individual applies for MA while institutionalized, shall be determined to have divested. A divestment results in ineligibility for MA for the institutionalized individual unless made to an exempt party under par. (b) or (c) or when one of the circumstances in par. (d) exist.....

The statutory requirement of a 36 month look back period takes precedence over the 30 month period in the code. Per §HSS 103.065(4)(d)(2), Wis. Adm. Code, an institutionalized person who is found to have made a prohibited divestment will not be found ineligible for MA if one of the following applies:

> 1. The transfer of property occurred as a result of a division of resources as part of a divorce or separation action, the loss of a resource due to foreclosure or the repossession of a resource due to failure to meet payments; or
>
> 2. It is shown to the satisfaction of the department that one of the following has occurred:
>
> a. The individual intended to dispose of the resource either at fair market value or for other valuable consideration;
>
> b. The resource was transferred exclusively for some purpose other than to become eligible for MA;
>
> c. The ownership of the divested property was returned to the individual who originally disposed of it; or
>
> d. The denial or termination of eligibility would work an undue hardship. In this subparagraph, an "undue hardship" means that a serious impairment to the institutionalized individual's immediate health status exists. (Emphasis added.)

The MA Handbook, 14.2.9, provides as follows:

> "Value received" is the amount of money or value of any property or services received in return for the person's property. The value received may be in any of the following forms:
>
> 1. Cash.
>
> 2. Other assets such as accounts receivable and promissory notes (both of which must be valid and collectible to be of value), stocks, bonds, and both land contracts and life estates which are evaluated over an extended time period.
> 3. Discharge of a debt.

> 4. Prepayment of a bona fide and irrevocable contract such as a mortgage, shelter lease, loan, or prepayment of taxes.
>
> 5. Services which shall be assigned a valuation equal to the cost of purchase on the open market. Assume that services and accommodations provided to each other by family members or other relatives were free of charge, unless there exists a written contract (made prior to the date of transfer) for payment.

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the county, like the denial of MA due to a divestment of assets was improper given the facts of the case. See, 20 C.F.R. §§416.200-416.202; see also, 42 C.F.R. §435.721(d). The burden of proof is on the applicant or recipient to show that one of the above circumstances exists. While oral testimony concerning the intent of the applicant is important, great weight must be afforded by the actions taken by the applicant given the overall circumstances at the time. A divestment can still exist even if someone does the transfer of the nonexempt asset other than the individual. Such a person could be, for example, a guardian or attorney in fact.

II DIVESTMENT IN THIS CASE

The county agency maintains that the transfers of a portion of the property are void because the petitioner's attorneys in fact engaged in self-dealing. The county agency argued that if the transfers are void, the petitioner would still own the property and the net proceeds from the sale should have gone to her. The disbursement of those funds in June would then constitute a divestment.

Self-dealing exists when an agent acting pursuant to a durable power of attorney has the power to make gifts, especially after the principal becomes incapacitated. This was discussed in *Praefke v. American Enterprise Life Insurance Co*., 2002 WL 1857384 (Wis. App.), decided on August 14, 2002, but not yet published except by Westlaw on its web site. In that decision, the court stated:

> …we hold that an attorney-in-fact may not make gratuitous transfers of a principal's assets unless the power of attorney from which his or her authority is derived expressly and unambiguously grants the authority to do so.

In the decision, the *Praefke* court discusses *Alexopoulos v. Dakouras*, 48 Wis.2d 32, 179 N.W.2d 836 (1970). In that case, the durable POA contained general language that was actually stronger than what is contained in the petitioner's POA. That court stated the following:

> The purpose of a simple power of attorney which does not by its very terms specifically provide for a gift over or an unlimited or unbridled power of disposition is to evidence the authority of the agent to third parties with whom the agent deals. The document was proper and sufficient to confer that authority on William Dakouras. It authorized him to withdraw deposits from the bank in the name and in the stead of the principal, Vasilios Diamantopoulos, and the bank properly accepted it as such; but a document of this kind falls far short of granting the attorney-in-fact the power to dispose of the assets for his own purposes.
>
> Inasmuch as the agent herein has failed to account for his principal's funds, he is liable for conversion. 3 C.J.S. Agency s 163b, p. 50; Importsales, Inc. v. Lindeman (1957), 231 La. 663, 92 So.2d 574; Manufacturers' Casualty Ins. Co. v. Mink (1943), 129 N.J.L. 575, 30 A.2d 510.

> We need not characterize the relationship between principal and attorney-in-fact as a 'trust' to conclude that by analogy the fiduciary obligation of an agent and a trustee impose similar duties, although the obligation of a trustee is usually to account to the beneficiaries of the trust rather than the settlor of the trust. The duty of an agent is to account to his principal. Both agents and trustees are fiduciaries. Restatement, 1 Agency 2d, p. 62, sec. 14b; Samia v. Central Oil Co. of Worchester (1959), 339 Mass. 101, 158 N.E.2d 469. At page 126, the Massachusetts court, 158 N.E.2d at page 484 stated:
>
> > 'An agent or fiduciary is under a duty to keep and render accounts and, when called upon for an accounting, has the burden of proving that he properly disposed of funds which he is shown to have received for his principal or trust.'

I must note without further comment the following from *State v. Hartman*, 54 Wis.2d 47, 56-57, 194 N.W.2d 653 (1972), which also discusses *Alexopoulos*: "We need not dwell upon additional ethical questions that might well be raised when the will drafted by an attorney permits self dealing with the assets of an estate."

Finally, in *Praefke*, the court explains why self-dealing is an important problem:

> We believe the interest of justice supports the application of this rule. A durable gifting power is a particularly dangerous power in that it survives the principal's personal ability to monitor its exercise. According to one commentator, the current widespread financial exploitation of the elderly is directly attributable to durable gifting powers and their inherent potential for fraud and abuse. Hans A. Lapping, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 ELDER L.J. 143, 167 (1996). This commentator has called the abuse of powers of attorney an "invisible epidemic" because the victims, who are usually elderly and infirm, may be unaware of what is happening or too embarrassed or frightened to assert their rights. *Id.*
>
> In addition, people of advanced age, especially those who are isolated and dependent, commonly tell friends and family what they believe those individuals want to hear to promote harmony and companionship. It would be imprudent for this court to allow Glasslein's alleged statements to Praefke to negate Glasslein's formal expression of her intent as embodied in the power of attorney agreement. Glasslein could have ensured that Praefke would receive the bulk of her assets by drafting a power of attorney that explicitly authorized self-dealing. That she did not do so is perhaps more telling of her true intent than any alleged statements to Praefke.

The petitioner's attorney, Scott Thompson, argued that as both individuals acted as a power of attorney, there was no self-dealing since one POA actually gifted half of the proceeds to the other. Based on the above language, this is a weak argument. First, it is not clear that each POA transferred a half to each other or to herself. Even if it was clear, this type of "reciprocal arrangement" also violated the fiduciary duty each of them had to their principal since the result is self-enrichment.

State law makes it clear that conveyances by agents not authorized by the principal are void.

> (1m) A conveyance signed by one purporting to act as agent for another shall be ineffective as against the purported principal unless such agent was expressly authorized, and unless the authorizing principal is identified as such in the conveyance or in the form of signature or acknowledgment. The burden of proving the authority of any such agent shall be upon the person asserting the same.

See Wis. Stats. §706.03(1m). This provision was interpreted in the case of *Lucareli v. Lucareli*, 237 Wis. 2d 487, 614 NW 2d 60 (Ct. App. 2000) as follows:

> The trial court concluded that Les Lee's lack of authority to execute the deed in his favor voided his share but effectively conveyed shares to his brothers. We disagree. Les Lee executed one deed. He was not expressly authorized to do so at the time and his action was not later ratified. The effect of his acting outside his scope of authority is clear from the language of Wis. Stat.§706.03(1m)-the conveyance is void. "*A conveyance* signed by one purporting to act as agent for another *shall be ineffective* as against the purported principal unless such agent was expressly authorized." Wis. Stat. §706.03(1m) (emphasis added). A conveyance is a "transfer of title to land from one person, or class of persons, to another by deed." Black's Law Dictionary 333 (6th ed. 1990). Les Lee executed one deed to effectuate one conveyance. But he was not authorized to execute the deed because he was one of the grantees and his power of attorney prohibited self-gifting. Under the statute, the conveyance was ineffective. Lucille never granted the property to the brothers. Thus, it remains in her estate and should be dealt with accordingly.

See *Lucareli*, 237 Wis. 2d at 496. In *Lucareli*, the principal had expressly prohibited the agent from conveying property to himself. However, given the cases above, the lack of such a direct prohibition is not determinative in the case at hand. When it comes to self-dealing by an agent, there must at least be specific authorization, which was lacking in the petitioner's DPOA.

Mr. Thompson argued that the ALJ does not have the authority to void the conveyances at this time. He is partially correct. Administrative agencies only have those powers specifically delegated to them. Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F. Supp. 540, 545 (D.C. Wis. 1977). There is no specific legislation delegating the power to void an otherwise legally sufficient Quit Claim deed duly filed with the county register of deeds to a department Administrative Law Judge. However, I am not voiding the actual sale of the property to the innocent third party. Instead, my focus is strictly on the effect of the earlier conveyances in relationship to MA eligibility. Based on *Lucareli*, the multiple transfers of the property to the POA's must be considered void for the purposes of MA eligibility. Thus, I will not consider them as having taken place. For the purpose of MA eligibility the petitioner remains the owner of the property up to the moment of its sale to the third party on June 5th.

The DPOA did authorize the POA's to sell the property to a third party. The moment the divestment occurred was when the POA's kept the net proceeds from the sale. Thus, on June 5, 2002, the petitioner divested $39,490. This results in a 9-month penalty period. (See the MA Handbook, Appendix 14.5.0.)

CONCLUSIONS OF LAW

1. The petitioner's POA's engaged in self-dealing by transferring the petitioner's property to themselves without clear authority to do so.
2. For the purposes of MA, the conveyances by the POA's of the principal's property to themselves are void.
3. The POA's retention of net proceeds from the sale of the property is a divestment with a 9-month penalty period.

NOW, THEREFORE, it is **ORDERED**

That the petition for review be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 11th day of September, 2002

/s/sJoseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
1014/JAN